

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 5, 2007

**ROBBIE KEELER v. THE METROPOLITAN NASHVILLE AIRPORT
AUTHORITY**

**Appeal from the Chancery Court for Davidson County
No. 04-2045-IV Richard Dinkins, Chancellor**

No. M2006-00394-COA-R3-CV - Filed September 13, 2007

Employee of the Metropolitan Nashville Airport Authority (MNAA) appeals the MNAA's decision to demote her based on a determination that Employee abused her authority by attempting to have a subordinate conduct her job-specific testing, which she had previously failed. Finding substantial and material evidence to support the MNAA's decision, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Phillip L. Davidson, Nashville, Tennessee, for the appellant, Robbie Keeler.

James E. Gaylord, Nashville, Tennessee, for the appellee, Metropolitan Nashville Airport Authority.

OPINION

On September 16, 2002, the Metropolitan Nashville Airport Authority's Department of Public Safety (MNAA) ordered an internal affairs investigation into allegations that Lieutenant Robbie Keeler had abused her authority by attempting to have a subordinate, Sergeant Charlotte Humber, conduct her job specific physical agility test, which Lt. Keeler had previously failed. On December 10, 2002, the MNAA issued a notice of intent to demote Lt. Keeler based on the investigation, finding that Lt. Keeler's conduct violated MNAA's Rules of Conduct, Procedure 2-603, "Failure to act in a reasonable manner or any other act or failure to act by an employee, which reflects on his/her fitness for the job, or which adversely affects the Authority service or reputation."

On January 23, 2003, Lt. Keeler exercised her right to a disciplinary appeal hearing. After the hearing, the MNAA's President demoted Lt. Keeler to Sergeant effective December 10, 2003. Lt. Keeler thereafter appealed the decision to the MNAA's Board of Commissioners, which referred the matter to an Administrative Law Judge (ALJ). Beginning on May 3, 2004, the ALJ conducted

a two day hearing in which all the parties were represented by counsel and the testimony of ten witnesses was heard. The ALJ made written findings of fact and recommended that the decision of the MNAA's President be affirmed. The ALJ's written findings of fact were as follows:

The following facts are uncontested:

1. Robbie Keeler was employed by MNAA on May 1, 1989. Prior to June of 2002, she had been promoted to rank of Lieutenant.
2. On June 3, 2002 Lt. Keeler failed two parts of the Job Specific Related Functions Test required of MNAA public safety employees. She took 60.65 second to drag or carry a 150 pound dead weight 50 feet. To pass the test she needed to perform this function in 45 seconds. She did not complete a test requiring her to run 50 feet and pull a fully-charged hose 100 feet in a time of 60 seconds.
3. Captain Von Witherspoon was the head of the MNAA Department of Public Safety's Support Services Division in the summer of 2002. That department was in charge of the test program. In August 2002, Lt. Keeler came to Captain Witherspoon and announced that Sergeant Charlotte Humber was going to administer the test to her in a one-on-one session. Captain Witherspoon denied the request, but in a few days Lt. Keeler made the request again. Again Captain Witherspoon denied the request due to the trouble and expense of setting up the test for just one person. Lt. Keeler was advised to take the test at the next regularly-scheduled date.
4. Captain Highers, the head of Patrol Division, also requested that Lt. Keeler be given the test on an individual basis.
5. On or about September 12, 2002 Lt. Keeler asked Officer Gary Glover to allow Sgt. Humber to administer the test for Lt. Keeler individually. Officer Glover declined the request and advised Lt. Keeler to take the test with the next group.
6. Lt. Keeler later made the same request to Assistant Chief Lomonaco. Lt. Keeler repeated the test on October 9, 2002 with other participants. On that date she passed all parts of the test except the hose-drag portion. After the test she required first aid because of physical exhaustion.
7. The record does not contain any evidence that the test was ever given to a single individual.
8. Lt. Keeler finally passed all portions of the test on November 6, 2002.

The following testimony is controverted:

9. Sergeant Charlotte Humber testified that on June 13, 2002, Lt. Keeler called her at home and said she (Lt. Keeler) had failed the job-specific test; that she was going to arrange to take the test herself with Sgt. Humber administering the test; and that Sgt. Humber had to "take care of me on this, since I'm your lieutenant and do your PR" (Personnel Review).
10. Sgt. Humber also testified that after that date, Lt. Keeler called her while she was on duty and repeated the request.
11. In the summer of 2002, Sgt. Humber was off duty for several weeks due to medical problems.

12. Sgt. Humber testified that when she returned to duty, Lt. Keeler announced in the line-up room, in the presence of Sgt. Buddy Toon, that she had arranged to have the test administered to her personally by Sgt. Humber. When her request was later refused by those in charge of the test, Lt. Keeler demanded that Sgt. Humber join her in protesting the denial.

13. At that point Sgt. Humber decided to report the whole series of incidents to Capt. Witherspoon. That report set in motion the internal affairs investigation.

14. Lt. Keeler denies that she ever asked Sgt. Humber to do anything improper or that she attempted to coerce Sgt. Humber into falsifying the test results. She admits calling Sgt. Humber at home, but says it was for the purpose of getting a workout plan. Lt. Keeler's explanation for Sgt. Humber's accusations is that Lt. Keeler had complained about Sgt. Humber's fiancé (later her husband) hanging around the fire hall and using the gym without signing the proper waiver. She produced an e-mail sent to Captain Highers on June 20, 2002 which reads as follows:

Captain, some of the officers are asking in (sic) Sgt. Humber's boyfriend is authorized in the weight room or if he has signed the waiver sheet and gotten prior approval. Please advise so I can correct this issue. Thanks. Lt. K.

15. Captain Highers and Lt. Jordan also remember Lt. Keeler complaining about Sgt. Humber's boyfriend being around so much, but they specifically recall that her complaints began after Sgt. Humber's revelations started the internal affairs investigation.

16. Lt. Keeler gives two reasons for asking that the test be administered to her individually by Sgt. Humber. She says she wished to get it over with because there were rumors that her unit was about to be called to active duty; and she says that she had had a long-standing objection to having her body fat tested by a male officer. Her objections to the body fat test were corroborated by other witnesses, but the evidence is in conflict as to whether she had to take that test every time she took the job-specific test.

On June 16, 2004, the MNAA's Board of Commissioners unanimously adopted the recommendation of the ALJ and affirmed the decision of the MNAA's President to demote Lt. Keeler. On July 12, 2004, Lt. Keeler filed a petition for review in the Chancery Court for Davidson County. The court dismissed Lt. Keeler's case on January 20, 2006, finding that the MNAA's decision was supported by substantial and material evidence. Lt. Keeler appeals.

Review of decisions by the MNAA is by common law writ of certiorari pursuant to the provisions of Tenn. Code Ann. § 27-8-101 and is limited to a determination of whether the MNAA exceeded its jurisdiction or acted illegally, fraudulently or arbitrarily. *Hoover Motor Express Co. v. R.R. & Pub. Util. Comm'n*, 261 S.W.2d 233, 238 (Tenn.1953); *see also* Tenn. Code Ann. § 42-4-

110(a)(11).¹ The court is not empowered to inquire into the intrinsic correctness of the administrative board's decision; to re-weigh the evidence; or to substitute its judgment for that of the administrative board. *Moore v. Metro Bd. of Zoning Appeals*, 205 S.W.3d 429, 435 (Tenn.Ct.App.2006).

If there is no evidence to support an action of an administrative board, it is arbitrary. *Sexton v. Anderson County*, 587 S.W.2d 663, 667 (Tenn.Ct.App.1979). The board's determination must be supported by "more than a scintilla or glimmer of evidence.... It must be of a substantial, material nature." *Pace v. Garbage Disposal Dist.*, 54 Tenn.App. 263, 390 S.W.2d 461, 463 (1965). The "material evidence" standard requires "such relevant evidence as a reasonable mind might accept as adequate to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration." *Id.*

Demonbreun v. Metro. Bd. of Zoning Appeals, 206 S.W.3d 42, 46 (Tenn.Ct.App.2005).

Lt. Keeler's sole argument on appeal concerns whether there was substantial and material evidence to support the ALJ's decision. Lt. Keeler contends that accepting as true Sgt. Humber's version of the facts, the ALJ disregarded Sgt. Humber's three month delay in reporting Lt. Keeler's misconduct, Sgt. Humber's reputation for untruthfulness, and the possibility that Sgt. Humber was in line for Lt. Keeler's job. Lt. Keeler also argues that the ALJ's credibility determination based on conflicting accounts cannot amount to substantial and material evidence.

The significance of the hearing officer's or administrative judge's credibility determinations depends largely on the importance of credibility in the particular case. *Universal Camera Corp. v. NLRB*, 340 U.S. at 496, 71 S.Ct. at 468-69; 2 Admin. Law & Prac.. § 5.64[5](d), at 241-42. If credibility is not a central ingredient of the agency's decision, then the hearing officer's or administrative judge's credibility determinations are not very significant. If, however, credibility plays a pivotal role, then the hearing officer's or administrative judge's credibility determinations are entitled to substantial deference. *Dep't of Health & Mental Hygiene*, 641 A.2d at 907.

McEwen v. Tenn. Dept. of Safety, 173 S.W.3d 815, 824 (Tenn.Ct.App.2005).

¹ Tenn. Code Ann. § 42-4-110(a)(11) specifically applies to the MNAA and provides that "[f]indings of fact by the board shall not be subject to review by any court except for illegality or want of jurisdiction."

In this case, the ALJ had the opportunity to observe both Lt. Keeler and Sgt. Humber as they testified and to assess their credibility. It is clear from the ALJ's written findings of fact and recommendation that the ALJ acknowledged Sgt. Humber's three month delay in reporting Lt. Keeler's misconduct, Sgt. Humber's reputation for untruthfulness, and the possibility that Sgt. Humber was in line for Lt. Keeler's job. However in exercising its role as the finder of fact, the ALJ resolved the question of credibility in favor of Sgt. Humber:

This case turns on the credibility of the main witnesses. Sgt. Humber's credibility is attacked on the basis of her animosity toward Lt. Keeler over the issue of Sgt. Humber's boyfriend. In addition, Lt. Keeler offered evidence that Sgt. Humber's reputation for truthfulness was bad and that she was "manipulative". There is also in the record, a suggestion that Sgt. Humber might be in line for Lt. Keeler's job.

Humber admitted lying in an investigation subsequently conducted about her boyfriend's violation of the rules put down to limit his time at the airport. Her testimony overall, however, is consistent with the undisputed facts in this case, and she testified convincingly that she was not aware of [] Keeler's complaints about her boyfriend until the chief started the investigation.

Lt. Keeler's explanation for why she sought the one-on-one test so persistently is less convincing. Obviously, the test was given regularly to groups of employees, so Lt. Keeler could take the regular test almost as quickly as sh[e] could arrange to be tested by Sgt. Humber. In addition, the minimally invasive body fat test could have been taken (as it later was) by [] any female officer or employee.

Lt. Keeler also complained that not only Sgt. Humber, but others in the department were out to get her. She described one of the persons administering the test as a "chauvinist"; she complained that the chief was hard on her; she thought that some of the photographs that had circulated in the department while she was on active duty were aimed at her. She denied that she had threatened to sue the Airport Authority if she ever lost her job over the job-specific test, but the proof is clear that she did make that threat.

Finally, if Lt. Keeler is correct that Sgt. Humber was out to get her after the June 20, Complaint to Captain Highers, why would she persistently try to get permission for Sgt. Humber to administer the test in August and September?

The question of credibility should be resolved in favor of Sgt. Humber's version of the facts.

After carefully reviewing the record and affording due deference to the ALJ's credibility determination, we find that the decision of the ALJ is supported by substantial and material evidence. The judgment of the trial court is affirmed and the costs of appeal are assessed against Appellant, Lt. Keeler.

WILLIAM B. CAIN, JUDGE